No. 1455.

United States Circuit Court of Appeals

IN AND

FOR THE NINTH CIRCUIT.

A. ZIMMERMAN, ED. WURZBACHER, ROY FAIRBANKS, and ANDREW JACK,

Plaintiffs in Error,

vs.

JAMES FUNCHION and AMY SALE,

Defendants in Error.

Reply Brief

~~Statement of the Case~~ on Behalf of Defendants in Error.

CLAYPOOL, KELLUM & COWLES, and
FERNAND de JOURNEL,

Attorneys for Defendants in Error.

T. C. WEST,

Of Counsel.

PRESS OF THE JAMES H. BARRY CO.
212-214 LEAVENWORTH ST.

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STATEMENT OF THE CASE ON BEHALF OF DEFENDENTS IN ERROR.

This is an action in ejectment brought by the defendants in error to determine the right of possession to a certain placer mining claim known as Creek Claim No. 6 Above Discovery, on Dome Creek, in the Fairbanks Recording District of Alaska.

The dispute between the plaintiffs in error and defendants in error is as to a three-cornered strip of ground lying just south of the northerly boundary line of the claim mentioned. The defendants in error lo-

cated this strip of ground under location made on the 17th day of September, 1902, as part of their said Creek Claim No. 6, and the plaintiffs in error claim it as part of their location of Bench Claim No. 6, First Tier on the Right Limit of Dome Creek, under their location made on the 12th day of May, 1904.

The testimony shows that Funchion, one of the defendants in error, located said Creek Claim on behalf of one John Cameron Ross on said 17th day of September, 1902, and that he put out his initial post, marked "H" on defendant's Exhibit B, as his upper center post, and at the same time staked the upper or east end corners marked as "B" and "G" on said exhibit; that he also staked his initial post at the point marked "E" on said Exhibit B, and his lower right hand corner post at "A" on said exhibit, and finally his lower left hand post at "F."

The testimony further shows that at the time of setting out and marking said posts, the defendant in error Funchion also blazed a trail from his lower initial post "E" to his lower right hand corner post "A."

The testimony of the defendant in error Funchion also shows that upon his upper initial post "H" he placed a notice that he claimed 1320 feet downstream and 660 feet in width, and a similar notice was placed on his lower initial post "E," claiming 1320 feet upstream. There is a conflict of testimony given by the plaintiff in error, Zimmerman, and the defendant in error, Funchion, as to the wording of these notices, the

plaintiff in error, Zimmerman, claiming that the notices read 1320 feet up or down stream and 330 feet on each side of the posts, and the defendants in error claiming that it read 660 feet wide. The undisputed testimony also shows that the defendant in error, Funchion, in 1903, sank a hole within the limits of his said Creek Claim No. 6 to the depth of about 22 feet to bedrock and discovered gold in paying quantities. It is admitted on all hands that the claims were recorded by the respective parties within the time required by the statute.

After the commencement of the action, the defendants in error discovered for the first time that their claim was in excess of the 20 acres authorized by the statutes, and they thereupon filed a notice of abandonment of the excess so staked by them, and relocated their claim as set out in Exhibit C (Trans. of Record, p. 341), and thereupon, by leave of the Court, filed their amended complaint, claiming the ground embraced in their relocation.

The real dispute between the parties seems to hinge on the question of the location of the lower right hand corner stake, as to whether it was located at the point marked "A" or the point marked "C" on defendants' Exhibit B. There being a very serious conflict of evidence upon this point, the learned trial judge directed Herbert Wilson, a witness on behalf of the defendants in error, and Ralph Hatton, a witness on behalf of the plaintiffs in error, to proceed to the claim and examine

said stakes afresh, and to report to the court (see Trans. of Record, p. 264).

On reporting to the Court it was found that the witness Hatton, who had previously testified, on behalf of the plaintiffs in error, that said lower right hand corner stake was located at the point marked "C" on said Exhibit B, admitted that he was mistaken and that such lower right hand corner stake was situated at the point claimed by the defendants in error, viz., "A" on said Exhibit B. The Court therefore found as a fact that that is where said corner post was located by the defendants in error. Legal conveyances of the claim in question from John Cameron Ross to the defendants in error are admitted by all parties.

ARGUMENT.

All the questions of fact being found by the trial judge in favor of the defendants in error, this Court will not disturb the findings, and it seems to the writer that but one question remains, viz., whether the defendants in error had the right, as a matter of law, to abandon the excess of their location on either side, or whether they were compelled to abandon the excess that was included in the alleged location of the plaintiffs in error.

There is no question but that the defendants in error located their claim in good faith on the 17th day of December, 1902. There is also no question but that they discovered gold within the limits of their claim

and outside of the portion thereof afterwards abandoned as excess in 1903, and that their notice of location was duly recorded within the time prescribed by law.

Three things are requisite to establish a valid placer mining location in Alaska: (1) The location and marking of the boundaries so that they can be readily traced; (2) the discovery of gold in sufficient quantity to warrant the further expenditure of time and money in the development of the claim; and (3) recordation of the notice of location. When these three things are done the locator then has a perfect title to the claim as against all the world except the United States.

All these things were done by the defendants in error, and they had at the time of the location of Bench Claim No. 6, First Tier, Right Limit, on Dome Creek, by the plaintiffs in error, on May 12, 1904, a perfect title to Creek Claim No. 6.

It is admitted in the opening brief for the plaintiffs in error that "the law seems to be clearly settled that " where a mining claim is located in excess of the stat- " utory area in good faith and injures no one at the " time it is made, it is void only as to the excess."

Lindley on Mines, Sec. 362;
Snyder on Mines, Sec. 398;
English vs. *Johnson,* 17 Cal., 108-117;
Howeth vs. *Sullenger,* 113 Cal., 547;
Thompson vs. *Spray,* 72 Cal., 528;

Jupiter Mining Co. vs. *Bodie Con. M. Co.*, 11 Fed., 666.
Patterson vs. *Hitchcock*, 3 Colo., 533;
Taylor vs. *Parenteau*, 48 Pac., 505;
Hanson vs. *Fletcher*, 37 Pac., 481;
McPherson vs. *Julius*, 95 N. W., 428-435;
McElliott vs. *Keogh*, 90 Pac., 823-5.

Counsel for the plaintiffs in error generously abandon the contention that the rule laid down in Montana —that where a claim is located and the outlying boundaries indicate a location in excess of the statutory area, not the excess alone, but the whole location, is void— is the general law, and admit that the sound rule is that the excess alone is void. For this generosity on their part we are duly grateful.

The contention of counsel for the plaintiffs in error, on pages 38 and 39 of their brief, would be very ingenious although not convincing, if their assertion that the location notice claimed 1320 feet upstream and 330 feet on each side of the initial stake, were correct; but, unfortunately for that contention, the wording of that location notice was one of the disputed points in the testimony that was resolved by the trial judge in favor of the contentions of the defendants in error; therefore, their argument is not within the facts found by the Court.

The location of a mining claim by mistake for more than the 200 feet on the vein allowed by the United States Statutes and the local laws of the mining district

is not necessarily void as to the whole, but the excess may be rejected and the claim held good as to the remainder unless it interferes with rights previously acquired.

> *Richmond Min. Co.* vs. *Rose etc.,* 114 U. S., 576;
> *McIntosh et al.* vs. *Price et al.,* 121 Fed., 716.

Again, where a location otherwise valid exceeds the width allowed by law, it is void as to the excess but valid as to the extent allowed by law.

> *Jupiter M. Co.* vs. *Bodie Con. M. Co.,* 11 Fed., 666;
> *McIntosh et al.* vs. *Price et al., supra.*

The defendants in error having a perfect title to their claim in 1904, the plaintiffs in error were trespassers on the portion of the claim in dispute, as the excess had not been determined. If the plaintiffs in error had the right to relocate a strip along the north side of the claim belonging to the defendants in error, there would be no reason why they could not locate a strip of land equal to the excess through the center of the claim and cut out the shafts which the defendants in error had sunk and thereby deprive them of their discovery of gold and further deprive them of their title to the whole claim.

How, then, should the excess of the location be determined, and from what portion of the claim should

it be cut? That is the question which this Court has to decide.

It will be remembered that in the testimony, the defendants in error located their initial post at the point marked "H" on Exhibit B; that they then located their initial post on the lower end of the claim at the point marked "E"; following this, the posts on the upper corners marked "B" and "G," respectively, were located, and afterwards the lower right hand corner post at the point marked "A" was located, leaving three corner posts and the end posts definitely fixed. The defendants in error then proceeded to locate the fourth and last corner of their claim at the point marked "F" on Exhibit B, and then made the mistake of traveling too far from "A" to "F," and in locating that line began to take in more land than the law allowed; in other words, began locating the excess of their claim. Immediately upon discovering that their claim was in excess of what the law allowed, they shortened this last line and drew in their lower left hand post, thereby eliminating such excess. The good faith of the defendants in error was further shown by their offer to convey to the plaintiffs in error a strip of land about 88 feet wide running along the east end of Creek Claim No. 6, which would have included the shaft sunk by the plaintiffs in error.

The United States Statutes provide that the form of a claim shall, as near as possible, conform to the United States system of surveys, and that as the initial stake

on the claim of defendants in error bore notice calling for 1320 feet by 660 feet, which is a subdivision of the system of surveys and a rectangular parallelogram, the defendants in error conformed to that rule, and when the excess was abandoned by them it left their location almost an ideal one, viz., that of a rectangular parallelogram.

A second locator cannot enter within the boundaries of a placer mining claim as staked by a prior locator and make a valid location on ground of which the first locator is in actaul possession and on which he is engaged in work, upon the ground that the first claim as staked exceeded the width prescribed by the local rules and regulations. The owner is entitled to select the portion which he will hold and to draw in his lines, and cannot be ousted from the portion he was engaged in working by a second locator thereon. This proposition seems to have been thoroughly discussed in the case of *McIntosh et al.* vs. *Price et al., supra,* and the facts in that case seem to counsel for the defendants in error to be on all fours with the facts in this, although counsel for the plaintiffs in error, in their anxiety to evade this decision, make a vain effort to distinguish it from the case at bar, and lay special stress upon what they claim to be an important point in their favor, viz., that the defendants in error were not in the physical possession of the land in controversy in the year 1904 when the plaintiffs in error located their bench claim overlapping the creek claim of the de-

fendants in error. But it is earnestly contended by defendants in error that inasmuch as they had completed all three requirements of the law relating to the location of placer mining claims in Alaska, and had acquired a perfect title as against all persons except the United States, it was not necessary for them to be in actual physical possession in order to protect their rights, as might be the case, for instance, if the defendants in error had not at that time made their discovery, or had not recorded their notice of location, or had not completed the staking out of the claim.

Considerable stress is also laid by counsel for plaintiffs in error upon the expression used in the case of

Richmond Min. Co. vs. *Rose,* 114 U. S., 576,

wherein the Court, in its decision, states:

> "We can see no reason in justice or in the nature of the transaction why the excess may not be rejected and the claim be held good for the remainder *unless it interferes with rights previously acquired,* the plaintiffs in error claiming that they had rights 'previously acquired'—i. e., acquired previous to the date of the rejection of the excess of the location by the defendants in error."

Discussing this particular expression, this Court, in the case of *McIntosh et al.* vs. *Price et al., supra,* says:

> "Rights previously acquired, so referred to, mean rights acquired prior to the time when the rights of the plaintiffs were initiated."

There is no question, and can be none, but that the rights of the defendants in error in this case were not only initiated two years prior to the location by the plaintiffs in error, but were absolutely established by a perfect title at least one year prior to such location by the plaintiffs in error. We believe that the case just cited is absolutely conclusive on that point.

Answering the contentions of counsel on the other side touching the various assignments of error relating to the findings of fact by the court below, we respectfully submit that there is ample evidence to warrant the findings made by the Court.

The findings of the Court upon the facts stand as the verdict of a jury when reviewed in an appellate court.

> *McIntosh et al.* vs. *Price et al., supra;*
> *Empire State-Idaho M. & D. Co.* vs. *Bunker Hill, etc.,* 114 Fed., 417.

Answering the argument of counsel for plaintiffs in error touching Assignment of Error No. 14, to the effect that defendants in error had failed to file with the recorder of the Fairbanks Recording District a proper notice of location, in that the same had no reference to natural objects or permanent monuments, we believe that the location notice comes clearly within the rule laid down in the case of *McIntyre et al.* vs. *Price et al., supra,* to the effect that a locator of a placer mining claim sufficiently complied with the law as to markings where he designates the boundaries by

reference to the corner of a prior claim, where he placed a substantial stake monument, and by placing at each of the other corners and at the center of each end line substantial stakes so that the boundaries could be readily traced.

See also:

> *Meydenbauer* vs. *Stevens,* 78 Fed., 787;
> *McKinley Creek M. Co.* vs. *Alaska United M. Co.,* 183 Sup. Ct., 563.

The evidence throughout the trial shows, and the trial court found as a fact, that the end and corner stakes were clearly marked, and that they had reference to the corner posts of the claims both up and down stream from the one in question.

It is respectfully submitted that this appeal should be dismissed and the judgment of the court below affirmed.

CLAYPOOL, KELLUM & COWLES, AND
FERNAND DE JOURNEL,
Attorneys for Defendants in Error.

T. C. WEST,
Of Counsel.